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When Determining Whether an ADA Claimant is Disabled, the Claimant's Impairment Must be Considered in Light of Available Corrective Measures, and Failure to Meet DOT Regulations Does Not Establish That the Claimant Was Regarded as Disabled: *Murphy v. United Parcel Service, Inc.*

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When Determining Whether an ADA Claimant is Disabled, the Claimant's Impairment Must be Considered in Light of Available Corrective Measures, and Failure to Meet DOT Regulations Does Not Establish that the Claimant was Regarded as Disabled: *Murphy v. United Parcel Service, Inc.*

EMPLOYMENT LAW — AMERICANS WITH DISABILITIES ACT — IMPACT OF CORRECTIVE MEASURES AND THE "REGARDED AS" CLAUSE — The United States Supreme Court held that an ADA claimant is not disabled when the use of corrective measures (such as medication) prevents the claimant's impairment from substantially limiting any major life activities, and that an employer does not regard the individual as disabled when the employer fires the claimant for failing to meet relevant DOT health requirements.

Murphy v. United Parcel Service, Inc., 119 S. Ct. 2133 (1999).

Vaughn L. Murphy worked as a mechanic for United Parcel Service ("UPS") for five weeks before he was fired because of his high blood pressure.[1] With medication, Murphy's high blood pressure had never affected his ability to work as a mechanic.[2] UPS, however, requires that all mechanics hold a valid Department of Transportation ("DOT") health card because they are occasionally required to drive commercial vehicles.[3] The DOT

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1. *See* Murphy v. United Parcel Service, Inc., 119 S. Ct. 2133, 2136 (1999). UPS hired Murphy on August 18, 1994. *See* Murphy v. United Parcel Service, Inc., 946 F. Supp. 872, 875 (D. Ka. 1996). Murphy was fired on October 5, 1994. *See* Murphy v. United Parcel Service, Inc. 141 F.3d 1185 (10th Cir. 1998). Blood pressure is the "tension of the blood within the systemic arteries." STEDMAN'S MEDICAL DICTIONARY 1423 (26th ed. 1995). The blood pressure in an average adult, while the heart is contracting, (systolic pressure) is approximately 120-145 mmHg (millimeters of mercury). *See* J.K. MASON & R.A. MCCALL, BUTTERWORTH'S MEDICO-LEGAL ENCYCLOPEDIA 42 (1987). While the heart is relaxed (diastolic pressure), the pressure is normally 75-85 mmHg. *See id.* "If the systolic pressure is 120[mmHg] and the diastolic is 80[mmHg], it will be written as 120/80." LAWYER'S MEDICAL CYCLOPEDIA OF PERSONAL INJURIES AND ALLIED SPECIALTIES § 23.7 (Richard M. Patterson ed. 4th ed. 1996).

2. *See Murphy*, 119 S. Ct. at 2136, 2139. Prior to his employment with UPS, Murphy worked for 22 years as a mechanic in jobs that did not require a commercial driver's license or DOT health certification. *See id.* at 2139. Shortly after his termination from UPS, Murphy was able to obtain work as a mechanic. *See Murphy*, 946 F. Supp. at 876.

3. *See Murphy*, 119 S. Ct. at 2136. Murphy was aware that the UPS job description for

erroneously granted Murphy a health card even though his blood pressure during his DOT physical examination exceeded DOT requirements.[4] UPS hired him as a mechanic in August of 1994.[5]

Subsequently, a UPS Medical Supervisor realized the error and Murphy's blood pressure was re-tested, again measuring above that allowed by the DOT.[6] UPS fired Murphy on October 5, 1994.[7]

Murphy sued UPS in the United States District Court for the District of Kansas, claiming that his high blood pressure was a disability and that his termination was in violation of Title I of the Americans with Disabilities Act ("ADA").[8] The District Court granted UPS's motion for summary judgement and held that, in determining whether Murphy was disabled under the ADA, his impairment should be evaluated in his medicated state.[9] According to the district court, because Murphy's high blood pressure is well controlled by medication, he is not disabled under the ADA.[10] The

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the mechanic's position included a requirement that the employee hold a commercial driver's license. *See Murphy*, 946 F. Supp. at 875. UPS required this commercial license because mechanics are expected to perform "road tests" and "road calls." *See id.* During his 5 weeks of employment, Murphy performed 12 – 18 road tests. *See id.* "A person shall not drive a commercial vehicle unless he/she . . . has . . . a medical examiner's certificate that he/she is qualified to drive a commercial motor vehicle." DOT Qualifications of Drivers, 49 C.F.R. § 391.41(a) (1998). "A person is physically qualified to drive a commercial motor vehicle if that person . . . has no current clinical diagnosis of high blood pressure likely to interfere with his/her ability to operate a commercial vehicle safely." 49 C.F.R. § 391.41(b)(6) (1998).

4. *See Murphy*, 119 S. Ct. at 2136. Murphy's blood pressure during his DOT physical examination on August 16, 1994 was measured at 186/124. *See id.* DOT Medical Regulatory Criteria for Evaluation of High Blood Pressure requires that an individual must maintain blood pressure less than or equal to 160/90. *See* 49 C.F.R. § 391.41(b)(6) (1998).

5. *See Murphy*, 119 S. Ct. at 2136.

6. *See Murphy*, 119 S. Ct. at 2136. A UPS Medical Supervisor discovered, during a review of medical files in September of 1994, that the DOT certification should not have been granted. *See Murphy*, 946 F. Supp. at 876. On September 26, 1994, Murphy's blood pressure was re-tested twice and measured 160/102 and 164/104. *See id.*

7. *See Murphy*, 119 S. Ct. at 2136.

8. *See id.* "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training and other terms, conditions, and privileges of employment." Americans with Disabilties Act (ADA), 42 U.S.C. § 12112(a) (1994). "The term 'qualified individual with a disability' means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8) (1994).

9. *Murphy*, 946 F. Supp. at 881.

10. *Id.* Without medication, Murphy's blood pressure is as high as 250/160 and limits activities such as walking, lifting, climbing, manual tasks and working. *See id.* at 873. With use of his medication, however, his own physician admits that Murphy has no significant restriction and functions normally. *See id.* at 875. Murphy's physician instructed him to avoid jobs that require repetitive lifting of greater than 200 pounds. *See id.* "The term 'disability'

lower court discounted regulations promulgated by the Equal Employment Opportunity Commission ("EEOC") that prohibit mitigating measures (including medicine) from being considered when determining whether an individual is "disabled" under the ADA.[11] The court also rejected Murphy's contention that he was terminated because UPS "regarded" him as being disabled.[12]

The United States Court of Appeals for the Tenth Circuit affirmed the district court's judgment, agreeing that corrective measures such as medication should be considered in determining whether an individual is disabled.[13] The court of appeals also confirmed that UPS had not "regarded" Murphy as disabled but, rather, had terminated him because he was not eligible for DOT certification.[14]

The Supreme Court of the United States granted Murphy's petition for certiorari to consider two issues: (1) whether corrective measures such as medications should be considered in determining whether an impairment substantially limits one or more major life activities, thereby rising to the level of "disability" for purposes of the ADA; and (2) whether UPS regarded Murphy as "disabled," thereby making him a disabled individual under the ADA.[15]

Justice Sandra Day O'Connor wrote the majority opinion for the Court, affirming the circuit court decision.[16] The majority found that the plain language of the ADA requires a court to consider corrective measures when determining whether a petitioner's impairment substantially limits a major life activity, thereby

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means, with respect to an individual-(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102 (2) (1994).

11. *Murphy*, 946 F. Supp. at 881. The EEOC is empowered to issue regulations to implement the employment provisions of Title I of the ADA. *See* 42 U.S.C. § 12116. The EEOC issued regulations to provide guidance regarding the proper interpretation of the term "disability." *See* 29 C.F.R. § 1630.2(g) (1998). The agency also issued an "Interpretive Guidance" stating that "[t]he determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices." *See* 29 C.F.R. pt. 1630, App. §1630.2(j) (1998).

12. *Murphy*, 946 F. Supp. at 882. This provision of the ADA provides protection for those with impairments that do not rise to the level of "substantially limiting one or more major life activities," but are nonetheless discriminated against because their employer "regards" them as being disabled. *See* 42 U.S.C. § 12103(2)(C) (1994).

13. *Murphy*, 141 F.3d at 1185.

14. *Id.*

15. *Murphy*, 119 S. Ct. at 2136.

16. *Id.* at 2136. Justice O'Connor was joined by Chief Justice Rehnquist and Justices Scalia, Kennedy, Souter, Thomas, and Ginsburg. *Id.* at 2135. Justice John Paul Stevens, joined by Justice Breyer, filed a dissenting opinion. *Id.*

qualifying as a disability under the ADA.[17] Therefore, the Tenth Circuit was correct in determining that Murphy is not disabled under the ADA, because regular medication prevents his high blood pressure from substantially limiting any major life activities.[18] The majority also affirmed that the mere fact that Murphy was not able to meet all DOT requirements to obtain a commercial driver's license did not establish that UPS discriminated against him because they mistakenly regarded him as disabled.[19]

On the same day as the publication of the *Murphy* opinion, the Supreme Court published its opinion in *Sutton v. United Airlines*,[20] which directly addressed the question of whether a disability determination should be made with reference to corrective measures.[21] *Sutton* was also an action brought under the ADA, by petitioners who were denied positions as commercial global airline pilots because of poor vision.[22] With the use of corrective lenses, the petitioners' visual impairments caused no limitation in daily activities.[23] The employer in *Sutton* successfully argued that the visual impairment should be evaluated in this corrective state in making a determination as to whether the petitioners were disabled.[24] The *Sutton* Court held that the petitioners, who without the use of corrective lenses were substantially limited in the major life activities of driving, seeing and working, were not disabled under the ADA.[25]

The *Sutton* Court noted that the EEOC, with authority to promulgate and implement regulations regarding the employment provisions of Title I of the ADA,[26] issued interpretive guidelines stating that the "substantially limited" analysis should be made without regard to mitigating measures such as medicines or assistive devices.[27] The *Sutton* Court, however, struck down these EEOC guidelines because they conflicted with the plain meaning of the ADA, despite a contrary holding by eight circuit courts of

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17. *Id.* at 2137.
18. *Id.* at 2138.
19. *Id.*
20. 119 S. Ct. 2139 (1999).
21. *Id.*
22. *See id.* at 2143.
23. *See id.*
24. *See id.* at 2149.
25. *Sutton*, 119 S. Ct. at 2149.
26. 42 U.S.C § 12116 (1994).
27. *Sutton*, 119 S. Ct. at 2145. *See supra* note 11 for a discussion of the EEOC's authority to promulgate such regulations.

appeals.[28] The Court held that the individual inquiry mandated by the ADA precluded classifying a diagnosis such as myopia, diabetes, or high blood pressure as a disability.[29] Each petitioner should be evaluated as to whether they are actually, presently substantially limited in a major life activity, considering any corrective measures employed.[30]

The *Murphy* majority applied the same rationale and found that Murphy, while taking his medication, was not substantially limited in one or more major life activities by his high blood pressure.[31]

The *Murphy* Court then addressed Murphy's contention that he was terminated because UPS "regarded" him as disabled.[32] The ADA provides protection for those individuals whose actual impairment does not rise to the level of substantially limiting major life activities, but are discriminated against because a covered entity mistakenly believes that the impairment is so limiting.[33] The *Murphy* Court framed this question as "whether evidence that petitioner is regarded as unable to obtain DOT certification is sufficient to create a genuine issue of material fact as to whether petitioner is regarded as substantially limited in one or more major life activities."[34]

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28. *Sutton*, 119 S. Ct. at 2145. *See* Bartlett v. New York State Board of Law Examiners, 156 F.3d 321, 329 (2d Cir. 1998); Washington v. HCA Health Servs. Of Texas, 152 F.3d 464, 470-471 (5th Cir. 1998); Baert v. Euclid Beverage, Ltd., 149 F.3d 626, 629-630 (7th Cir. 1998); Arnold v. United Parcel Service, Inc., 136 F.3d 854, 859-866 (1st Cir. 1998); Matczak v. Frankford Candy & Chocolate Co., 136 F.3d 933, 937-938 (3d Cir. 1997); Doane v. Omaha, 115 F.3d 624, 627 (8th Cir. 1997); Holihan v. Lucky Stores, Inc., 87 F.3d 362, 366 (9th Cir. 1996); Harris v. H & W Contracting Co., 102 F.3d 516, 520-521 (11th Cir. 1996). In fact, the *Sutton* Court stated that no agency had authority to issue regulations regarding the generally applicable provisions of the Act, including the interpretation of the term "disability." *Sutton*, 119 S.Ct. at 2143.

29. *Sutton*, 119 S.Ct. at 2143.

30. *Id.*; *see infra* notes 170 – 196 and accompanying text for further discussion of *Sutton*.

31. *Murphy*, 119 S. Ct. at 2137.

32. *Id.* Murphy contended that UPS regarded his high blood pressure as substantially limiting his ability to work, incorporating the inability to successfully obtain a DOT certification. *See id.* He argued that he was terminated because UPS regarded employment of individuals with high blood pressure as a risky venture because of the risk of heart attacks or strokes. *See* Murphy, 141 F.3d 1185.

33. . *See Murphy*, 119 S. Ct. at 2137. "[A] person is 'regarded as' disabled within the meaning of the ADA if a covered entity mistakenly believes that the person's actual, non-limiting impairment substantially limits one or more major life activities." *Id.*

34. *Id.* at 2138. The Court focused on Murphy's inability to obtain the DOT certification, not addressing whether he was "regarded" as disabled due to his high blood pressure. *Id.* The Court, again, cited their findings in *Sutton*. *Id.* The petitioners in *Sutton* argued that they were "regarded" as disabled by United Airlines because they could not meet the airlines' vision standards. *Sutton*, 119 S. Ct. at 2151. Justice O'Connor rejected this

Murphy contended that he was terminated because his employer believed that his high blood pressure, and his inability to obtain the necessary DOT certification, substantially limited his ability to work.[35] EEOC regulations, however, state that to be considered substantially limited in the major life activity of working, a petitioner must be restricted in the ability to perform a class, or broad range, of jobs.[36] Murphy, unable to obtain a DOT health certification, was only restricted in his ability to perform the specific job of "mechanic" as defined by UPS.[37] Moreover, UPS successfully argued that Murphy was terminated not because he was regarded as disabled, but merely because he was not able to meet the DOT standards, a requisite condition to working as a UPS mechanic.[38]

In a dissenting opinion, Justice John Paul Stevens, joined by Justice Breyer, referenced his dissent in *Sutton*.[39] In his *Sutton* dissent, Justice Stevens stated that the canons of statutory construction call for an analysis of the remedial purpose of the ADA and the intent of Congress regarding the role of corrective measures in determining whether a petitioner is "disabled" within the meaning of the ADA.[40]

The *Sutton* dissent pointed out that, although the Supreme Court majority held that the clear language of the ADA called for an impairment to be assessed in its corrected state, several circuit courts and the three agencies with authority to implement and regulate the ADA held otherwise.[41] Given the apparent ambiguity in

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argument, citing EEOC guidelines requiring that a petitioner be restricted in a broad class of jobs, as opposed to the specific position of "global airline pilot." *Id.*

35. *See Murphy*, 119 S. Ct. at 2136.

36. *See* 29 C.F.R. § 1630.2(j)(3)(I) (1999). The EEOC defines "substantially limits" as:

> significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

Id.

37. *See Murphy*, 119 S. Ct. at 2138.

38. *See id.* at 2137.

39. *See id.* at 2139 (Stevens, J., dissenting) (citing *Sutton*, 119 S.Ct. at 2152 (Stevens, J., dissenting)).

40. *See Sutton*, 119 S. Ct. at 2152-55 (Stevens, J., dissenting).

41. *Id.* at 2153 (Stevens, J., dissenting). Justice Stevens' dissenting opinion points out that eight federal courts of appeals agreed with the executive agencies that the disability determination under the ADA should be made without considering corrective measures. *Id.* (Stevens, J., dissenting) (citing Arnold v. United Parcel Service, Inc., 136 F.3d 854, 859-866 (1st Cir. 1998); Bartlett v. New York State Board of Law Examiners, 156 F.3d 321, 329 (2d Cir. 1998); Washington v. HCA Health Servs. of Texas, 152 F.3d 464, 470-471 (5th Cir. 1998); Baert

the ADA on this matter, Justice Stevens turned to the rules of statutory construction to determine the intent of the lawmakers on the issue and found that both House and Senate committees had stated that impairments should be analyzed without regard to mitigating measures.[42]

When applying this approach to the facts in *Murphy*, the dissenting Justice Stevens found that Murphy's severe high blood pressure substantially limited several major life activities, thereby qualifying him as disabled for purposes of the ADA.[43]

The Americans with Disabilities Act[44] was signed into law on July 26, 1990.[45] Although there is a long history of discrimination based on disability, this legislation marked the first attempt to provide comprehensive civil rights protection to the over 40,000,000 Americans with disabilities.[46]

A precursor to the ADA, the Rehabilitation Act of 1973,[47] prohibited disability discrimination in any federally funded

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v. Euclid Beverage, Ltd., 149 F.3d 626, 629-630 (7th Cir. 1998); Matczak v. Frankford Candy & Chocolate Co., 136 F.3d 933, 937-938 (3d Cir. 1997); Doane v. Omaha, 115 F.3d 624, 627 (8th Cir. 1997); Holihan v. Lucky Stores, Inc., 87 F.3d 362, 366 (9th Cir. 1996); and Harris v. H & W Contracting Co., 102 F.3d 516, 520-521 (11th Cir. 1996)). The EEOC, the Justice Department, and the Transportation Department are authorized by the ADA to implement Titles I, II, and III of the Act, respectively. *See* 42 U.S.C. §§ 12116, 12134, 12149 (1994).

42. *See Sutton*, 119 S. Ct. at 2154 (Stevens, J., dissenting). "[W]hether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids." S. REP No. 101-116, p. 23 (1989). "[T]he impairment should be assessed without considering whether mitigating measures, such as auxiliary aids or reasonable accommodations, would result in less-than-substantial limitation." *House Committee on the Judiciary*, H.R. REP. No. 101-485, pt. III, p. 28 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 451. The House report went on to say that a person with poor hearing would be covered under the test, "even if the hearing loss is corrected by use of a hearing aid." House Report 485 at 29. "Likewise, persons with impairments, such as epilepsy or diabetes, which substantially limit a major life activity are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication." *House Committee on Education and Labor*, H.R. REP. No. 101-485, pt. II, P. 52, *reprinted in* 1990 U.S.C.C.A.N. 304, 334. The dissenting Justice Stevens cited a 1984 opinion by Chief Justice Rehnquist for the proposition that "[i]n surveying legislative history [the Court has] repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying the proposed legislation. *Sutton*, 119 S. Ct. at 2154 (Stevens, J., dissenting) (citing Garcia v. United States, 469 U.S. 70, 76 (1984) (quoting Zuber v. Allen, 396 U.S. 168, 186 (1969)).

43. *Murphy*, 119 S. Ct. at 2139 (Stevens, J., dissenting).

44. 42 U.S.C. § 12101-12213 (1994).

45. *See* GARY PHELAN, DISABILITY DISCRIMINATION IN THE WORKPLACE § 1:01 (1998).

46. *See id.* § 1:02. The older view of protecting those with disabilities entailed a combination of public policy of social welfare legislation and charity. *See id.*

47. Rehabilitation Act, 29 U.S.C. § 794 (1994).

program, executive agency, or the United States Postal Service.[48] This legislation extended to those with disabilities the protections granted by the Civil Rights Act of 1964 against discrimination based on sex and race.[49] In 1986, Congress began a more thorough examination of the treatment of the disabled in society and law and found that discrimination was pervasive.[50] In response to these findings, Senator Lowell Weicker and Congressman Tony Coelho presented the first draft of the Americans with Disabilities Act in 1988, and President George Bush signed the final Act in 1990.[51]

The purpose of the ADA is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[52] The ADA attempts to do this in three primary areas: Title I addresses discrimination in employment settings; Title II focuses on discrimination in public servies; Title III bans discrimination in public accommodations.[53]

To bring a suit under Title I of the ADA, an individual must first establish that she is "disabled" within the meaning of the statute, then that she is qualified to perform the essential functions of the job (with or without reasonable accommodations), and finally that she has suffered some adverse action because of the disability.[54] The threshold issue in an ADA case under Title I is whether the petitioner is disabled under the ADA.[55] The overall disability analysis involves the following three steps: (1) identify the physical or mental impairment; (2) determine whether the activities that the claimant argues are limited by the impairment constitute "major life activities" under the ADA; and (3) determine whether the impairment substantially limits the major life activity.[56] As part of

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48. 29 U.S.C. § 794(a) (1994). "No otherwise qualified individual with a disability . . . shall . . . by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United Postal Service. *Id.*

49. *See* PHELAN, *supra* note 45, at § 1:03.

50. *See id.* at § 1:05. "8.2 million people with disabilities want to work but cannot find a job." *Id.*

51. *See id.* at § 1:05.

52. 42 U.S.C. § 12101(b) (1994).

53. 42 U.S.C. § 12101-12189 (1994). Title I is covered in §§ 12111-12117, Title II in §§ 12131-12165, and Title III in §§ 12181-12189. *Id.*

54. *See* Doane v. City of Omaha, 115 F.3d 624, 626 (8th Cir. 1997).

55. *See* Martha A. Garcia, *Americans with Disabilities Act: a Review of Recent Cases in Employment Discrimination*, 615 PRACTICING LAW INSTITUTE 413, 415 (1999).

56. *See* Bragdon v. Abbott, 524 U.S. 624, 631 (1998).

this process, one of the central issues of *Murphy* arose: should the impairment's limitation of a major life activity be evaluated with or without considering any ameliorative measures such as medications or assistive devices?[57] A trilogy of 1999 Supreme Court opinions, including *Murphy*, sought to resolve conflict on this issue in the circuit courts.[58] These cases also explored the applicability of the third prong of the ADA's disability definition, the "regarded as" clause.[59]

The Supreme Court's opinions in *Murphy* and *Sutton* significantly impacted the applicability of the ADA in employment discrimination cases. In *Sutton*, the employer was able to exclude potential employees because they could not meet company-created physical criteria.[60] In *Murphy*, the employer relied on DOT regulations to do the same.[61] In each case, it was held that the application of these criteria by the employer did not establish that the employer regarded the employee as disabled.[62] Three circuit courts of appeals, including the Tenth Circuit in *Murphy* and *Sutton*, had explored this issue with varied outcomes.[63] The role of corrective measures in the disability analysis, however, had been addressed in eight of the federal circuits, and of these, only the Tenth Circuit decisions in *Murphy* and *Sutton* held that the petitioner should be evaluated in the corrected state.[64] Eight other circuit courts looked to the legislative history of the ADA, and the relevant EEOC guidelines, in finding that the disability analysis

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57. *Murphy* 119 S.Ct. at 2136.

58. *See* Murphy v. United Parcel Service, 119 S. Ct 2133 (1999); Sutton v. United v. United Airlines, Inc., 119 S.Ct. 2139 (1999); and Albertson's Inc. v. Kirkingburg, 119 S.Ct. 2162 (1999). In *Alberton's*, a truck driver was fired because he could not meet the DOT vision requirements and sued his employer under the ADA. *Albertson's*, 119 S. Ct. at 2165. The Ninth Circuit found for the claimant, but the Supreme Court reversed, holding that the individual's ability to compensate for his visual impairment constituted a corrective measure that must be considered. *Albertson's*, 119 S. Ct. at 2167-69. The Supreme Court also held that the employer could rely on using the federal DOT regulations as qualifying standards for employment as a defense. *Albertson's*, 119 S. Ct. at 2170-72.

59. *Murphy*, 119 S. Ct. 2133; *Sutton*, 119 S. Ct. 2139; and *Albertson's*, 119 S. Ct. 2165. *See supra* note 12 for a discussion of the "regarded as" clause of the disability definition under the ADA.

60. *Sutton*, 119 S. Ct. 2150.

61. *Murphy*, 119 S. Ct. 2138.

62. *Sutton*, 119 S. Ct. at 2149-52; *Murphy*, 119 S. Ct. at 2137-38.

63. *See* Sutton v. United Airlines, Inc., 130 F.3d 893 (10th Cir. 1998); Murphy v. United Parcel Service, Inc., 141 F.3d 1185 (10th Cir. 1998); Doane v. City of Omaha, 115 F.3d 624 (8th Cir. 1997); and Holihan v. Lucky Stores, 87 F.3d 362 (9th Cir. 1996);.

64. *Murphy*, 141 F.3d 1185; *Sutton*, 130 F.3d 893.

should be made without regard for corrective measures.[65] The First, Second, Third, Fifth, Seventh, Eighth, Ninth, and Eleventh Circuit Courts came to this conclusion, but the Tenth Circuit Court disagreed.[66]

The Ninth Circuit was the first federal appeals court to apply EEOC guidelines regarding corrective measures to the analysis of whether an individual is disabled under the ADA.[67] In the 1996 case of *Holihan v. Lucky Stores*, the Ninth Circuit reversed the district court's decision to grant the employer's motion for summary judgment.[68] The issue in *Holihan* was whether the claimant was disabled within the meaning of the ADA or whether the employer had regarded the claimant as being disabled.[69] The circuit court held that although the claimant's mental impairment did not substantially limit the major life activity of work, there was a genuine issue of fact as to whether he was regarded as disabled.[70]

The issue of corrective measures in *Holihan* arose as a novel argument by the claimant.[71] During a leave of absence from his position due to a mental condition, the claimant worked at two other business ventures.[72] The claimant argued that these activities served as corrective measures, or treatment, for his mental

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65. Seven other circuit courts of appeals examined the legislative history of the ADA, and the relevant EEOC guidelines, in finding that the disability analysis should be conducted without regard to corrective measures: The First Circuit in Arnold v. United Parcel Service, Inc., 136 F.3d 854, 859-866 (1st Cir. 1998), The Second Circuit in Bartlett v. New York State Board of Law Examiners, 156 F.3d 321, 329 (2d Cir. 1998), the Fifth Circuit in Washington v. HCA Health Servs. of Texas, 152 F.3d 464, 470-471 (5th Cir. 1998), the Seventh Circuit in Baert v. Euclid Beverage, Ltd., 149 F.3d 626, 629-630 (7th Cir. 1998), the Third Circuit in Matczak v. Frankford Candy & Chocolate Co., 136 F.3d 933, 937-938 (3d Cir. 1997), the Eighth Circuit in Doane v. Omaha, 115 F.3d 624, 627 (8th Cir. 1997), the Eleventh Circuit in Harris v. H & W Contracting Co., 102 F.3d 516, 520-521 (11th Cir. 1996), and the Ninth Circuit in Holihan v. Lucky Stores, Inc., 87 F.3d 362, 366 (9th Cir. 1996). With *Murphy*, 119 S. Ct. 2133, and *Sutton*, 119 S. Ct. 2139, the United States Supreme Court rejected the position of these eight circuits and adopted the Tenth Circuit rule that ADA claimants should be evaluated for a disability in their corrected state.

66. *See supra* note 65.

67. *See Holihan*, 87 F. 3d 362.

68. *Id.* The district court granted summary judgment in favor of the employer because it found that Holihan did not establish that he was disabled within the meaning of the ADA. *Id.* at 365.

69. *See id.* at 365.

70. *See id.* at 366. The claimant's mental impairment was not severe enough to limit the major life activity of working. *See id.* The court did hold that there was a genuine issue of material fact as to whether the employer had regarded the claimant as disabled. *See id.*

71. *See id.* at 366.

72. *See Holihan*, 87 F.3d at 366. The claimant admitted that, during his leave of absence for the mental impairment, he worked up to 80 hours per week. *See id.*

impairment.[73] The Ninth Circuit dismissed this argument because the claimant put forth no evidence that the outside work could be considered treatment and because EEOC guidelines preclude the consideration of corrective measures in making a disability determination.[74] Although the issue of corrective measures was not central to the case, the Ninth Circuit presented and applied the EEOC guidelines on the matter without question or analysis.[75]

Later in 1996, in the case of *Harris v. H & W Contracting Co.*,[76] the Eleventh Circuit was faced with determining whether Graves' Disease[77] constituted an impairment and whether, absent the use of medication to control the disease, the claimant was substantially limited in the major life activity of working.[78] Upon applying the appropriate statutory language, the Eleventh Circuit held that Graves' Disease is an impairment under the ADA.[79] More importantly, the circuit court disregarded the fact that the claimant's condition was well controlled by medication when it analyzed the impact of the impairment on the major life activity.[80]

The employer in *Harris* contended that the claimant's condition did not substantially limit a major life activity because, other than a temporary episode as the result of an overdose of her medication, the medication allowed her to function without limitation.[81] The Eleventh Circuit recognized the paradox of a condition that is completely controlled by medication still being considered as substantially limiting a major life activity.[82]

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73. *See id.*

74. *See id.*

75. *Id.* "Under EEOC regulations, we are not to consider mitigating measures in determining whether an individual is disabled." *Id* at 366. Because Holihan failed to produce sufficient evidence that the work constituted treatment, the court did not need to assess the role of corrective measures in the disability analysis. *Id.*

76. 102 F.3d 516 (11th Cir. 1996).

77. The circuit court defined Graves' Disease as an endocrine disorder affecting the thyroid gland. *Harris*, 102 F.3d at 517.

78. *Id.* at 520.

79. *See id.* at 520. "[D]isorders of the thyroid gland fit squarely within the meaning of impairment . . . ." *Id.* "[T]he thyroid gland is an integral part of the endocrine system . . . ." *Id.* "[T]he Thyroid gland . . . secretes two hormones that regulate metabolism, growth, and development." *Id.* (quoting RANDOM HOUSE UNABRIDGED DICTIONARY (2nd ed. 1993)).

80. *Id.* at 520-21.

81. *Harris*, 102 F.3d at 520. With the use of the medication Synthroid, Harris had worked and lived her life without significant limitations, but was temporarily hospitalized for eight days in 1993 due to an overdose of her medication. *See id.* at 517-18. After the dosage was corrected, her physician cleared her to return to work without limitation. *See id.* at 518.

82. *See id.* at 520. "At first glance, it is difficult to perceive how a condition that is completely controlled by medication can substantially limit a major life activity." *Id.*

The court, however, applied the EEOC regulations calling for the disability determination to be made without considering corrective measures.[83] The court recognized that the interpretive guidance of the EEOC on the matter is not binding.[84] The Supreme Court's holding in the landmark administrative law case of *Chevron v. Natural Resources Defense Council, Inc.*,[85] however, guided the *Harris* court in stating that the ADA is silent on the specific issue, and therefore, the administrative agency's guidance on the matter should not be disturbed so long as it is "based on a permissible construction of the statute."[86] The *Harris* court saw no direct conflict between the EEOC interpretation and the language of the ADA, and nothing in the ADA that would preclude making the relevant analysis without regard to corrective measures.[87] Lastly, the *Harris* court presented the ADA's legislative history, including House and Senate reports, as support for the EEOC's position.[88]

The Eleventh Circuit's *Harris* opinion was the first to articulate the approach later presented in the *Murphy* and *Sutton* Supreme Court dissents.[89] The *Harris* court turned to the guidance put forth by the EEOC, gave it deference under a *Chevron* analysis, then buttressed it with the ADA's legislative history via House and Senate reports demonstrating Congressional intent that corrective measures be disregarded in the ADA disability analysis.[90]

The Eighth Circuit cited *Harris*, and applied a similar approach regarding corrective measures, in *Doane v. City of Omaha*.[91] This 1997 case involved a police officer who lost vision in one eye due to glaucoma.[92] Doane worked for nine years after losing sight in the eye, and his corrected vision was 20/20.[93] Doane had also

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83. *See id.*

84. *See id.* at 521.

85. 467 U.S. 837 (1984).

86. *See Harris*, 102 F.3d at 521. "[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. "[A]n agency's interpretation of a statute it is entrusted to administer should be given 'considerable weight' and should not be disturbed unless it appears from the statute or legislative history that Congress intended otherwise." *Harris*, 102 F.3d at 521.

87. *Harris*, 102 F.3d at 521.

88. *See id.*

89. *See supra* text accompanying notes 41 and 42 for discussions of the *Murphy* and *Sutton* dissents.

90. *See Harris*, 102 F.3d at 521.

91. 115 F.3d 624, 627 (8th Cir. 1997).

92. *See id.* at 625.

93. *See id.* With the use of eyeglasses, Doane had 20/20 vision, despite the fact that he was seeing out of only one eye. *Id.* During his employment period, he was able to maintain

developed subconscious measures of compensating for impairments to his peripheral vision and depth perception abilities.[94] The police department claimed that Doane, with the use of eyeglasses and the subconscious accommodations, was not substantially limited in the major life activity of seeing.[95] Agreeing with the Eleventh Circuit's *Harris* opinion that the ADA interpretive guidelines promulgated by the EEOC are based on a permissible construction of the statute, the *Doane* court held that the effects of corrective lenses and compensatory strategies should not be considered in the disability analysis.[96] Because the manner in which he sees was significantly different from that of the average person, Doane was protected by the ADA.[97]

The Third Circuit examined how the use of medication to control epilepsy should impact a disability determination in *Matczak v. Frankford Candy & Chocolate Co.*[98] In *Matczak*, the claimant had a thirty year history of epilepsy that was controlled by medication.[99] Matczak was terminated after a change in medication resulted in a temporary restriction of work activities.[100] The district court found for the employer, holding that Matczak's impairment did not substantially limit a major life activity because he was restricted in only a few activities and for only a limited period of time.[101] The Third Circuit reversed, stating that the lower court was confusing the impairment with the treatment and that the disability analysis should be made without regard to the corrective effects of medication.[102]

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his qualification as an expert in the use of firearms. *Id.*

94. *See id.* at 627. After nine years as an officer, Doane was given an eye exam and then "advised that his career was over." *Id.* at 625-26. Doane sought reemployment with the Omaha City police but was denied because he could not meet new vision standards that required binocular vision. *Id* at 626.

95. *See id.* at 627. The city urged the court to follow the holding of the Fifth Circuit that persons whose vision can be corrected to 20/200 are not handicapped. *Id.* at 628 (citing Chandler v. City of Dallas, 2 F.3d 1385, 1390 (5th Cir. 1993)).

96. *Doane*, 115 F.3d at 627.

97. *See id.* at 627-28.

98. 136 F.3d 933, 935 (3rd Cir. 1997).

99. *See id.* at 935. Epilepsy is a disorder of the brain, which is characterized by the sudden abnormal discharge of neurons in the brain, often resulting in convulsive seizures. TABER'S CYCLOPEDIC MEDICAL DICTIONARY 657 (18th ed. 1997).

100. *See Matczak*, 136 F.3d at 935. Matczak had never missed work because of his condition, and never had a seizure, until November of 1993, when a seizure at work resulted in a 17-day hospitalization. *See id.* He returned to work on new medication and with restricted duties for five and a half months, but was eventually fired. *See id.*

101. *See id.* at 936.

102. *Id.* at 936-37.

Because the ADA does not directly address the issue of corrective measures, the *Matczak* court turned to the EEOC guidelines and then to the ADA's legislative history.[103] The court noted that that the EEOC guidelines are not binding, particularly because they are not subject to the public notice and comment procedures of the Administrative Procedures Act ("APA").[104] The court granted some deference to the EEOC guidelines, however, because Congress had specifically charged the EEOC with promulgating regulations to implement the ADA.[105] As with the other circuit courts, the Third Circuit also looked to the legislative history of the ADA, specifically the Committee reports.[106] One of these reports cited epilepsy as an example of an impairment that substantially limits a life activity, even if the effects are controlled by medication.[107]

In *Arnold v. UPS*,[108] the First Circuit examined the corrective measures issue, this time in relation to the use of medication to control diabetes.[109] UPS refused to hire Arnold as a driver after he was unable to pass a DOT physical examination because of his diabetes.[110] The district court granted summary judgment for the employer because, in his medicated state, Arnold was unable to establish that he was substantially limited in a major life activity.[111] The First Circuit reversed, holding that the ADA protects the claimant if he is disabled, without regard for corrective measures

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103. *See id.* at 936.

104. *See id.*; Administrative Procedures Act, 5 U.S.C. § 500-596 (1994). "The EEOC's guidelines constitute an appendix to the regulations and therefore do not command the same degree of deference as the regulations themselves." *Matczak*, 136 F.3d at 937 (citing Appalachian States Low-Level Radioactive Waste Commission v. O'Leary, 93 F.3d 103, 112-13 (3d Cir. 1996)).

105. *Matczak*, 136 F.3d at 937 (citing Americans with Disabilities Act, 42 U.S.C. § 12116 (1994)).

106. *Matczak*, 136 F.3d at 937.

107. *See id.* (quoting H.R. REP. No. 101-485(II), at 52 (1990)). "[P]ersons with impairments, such as epilepsy or diabetes, which substantially limit a major life activity are covered under the first prong of disability, even if the effects of the impairment are controlled by medication." *Id.*

108. 136 F.3d 854 (1st Cir. 1998).

109. *Id.* at 856.

110. *See id.* at 857. Arnold was initially offered a job as a driver, pending his successfully passing a DOT physical examination. *See id.* During the examination, he informed the physician that he took insulin for diabetes, and was subsequently told he was precluded from obtaining the DOT certification. *See id.*

111. *Id.* at 856. Arnold controlled his diabetes by monitoring his blood glucose levels and giving himself regular injections of insulin. *See id.* Although he would die without such measures, he had controlled the condition for 23 years, even working as an automotive mechanic for six years without difficulty. *See id.*

such as medication.[112]

The *Arnold* court provided a thorough analysis, beginning with the language of the statute.[113] The court characterized the ADA language on the issue as "far from clear."[114] Finding that nothing in the text of the ADA addresses the role of medications or prosthesis in a disability determination, the First Circuit turned to a construction of the relevant statutory language in accordance with the "ordinary or natural meaning."[115] Holding that reasonable minds could differ on the interpretation of the ADA on this issue, the court looked to the legislative history of the Act.[116] Citing both House and Senate Committee reports that speak directly to both epilepsy and diabetes, the court found that Congress intended for the disability analysis to be made without considering ameliorative effects of medication on these conditions.[117]

The court went on to say that the ADA was intended as a broad remedial measure statute as indicated by Congress' statement in the ADA that "43,000,000 Americans are disabled and the number is increasing."[118] The court also pointed out that the employer's contention that corrective measures should be considered would lead to the anomalous result that those with impairments who can afford treatment would lose protection of the ADA, while those who cannot afford appropriate treatment would be protected.[119]

The *Arnold* court then looked to the EEOC guidelines.[120] It held that these guidelines should be granted a lesser degree of deference because they are not subject to the full promulgation process under the APA.[121] Even so, the court recognized that the ADA requires the EEOC to issue regulations necessary to carry out

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112. *Id.* at 866.

113. *Arnold*, 136 F.3d at 857-58.

114. *Id.* at 858. "A reasonable person could interpret the plain statutory language to require an evaluation either before or after ameliorative treatment." *Id.* at 859.

115. *See id.* "If Congress has not expressly defined a statutory term or phrase, a court should 'normally construe it in accordance with its ordinary or natural meaning.'" *Id.* (quoting Smith v. United States, 508 U.S. 223, 228 (1993)).

116. *Id.* at 859.

117. *Id.*

118. *Arnold*, 136 F.3d at 861. "[I]t seems more consistent with Congress's broad remedial goals in enacting the ADA, . . . [to] interpret the words . . . broadly, so the Act's coverage protects more types of people against discrimination." *Id.*

119. *See id.* at 862.

120. *See Arnold*, 136 F.3d at 863.

121. *Id.* at 864. The full promulgation process under the Administrative Procedures Act involves notice of the proposed rule making in the Federal Register, and an opportunity for interested parties to participate in the process by submission of arguments. *See* The Administrative Procedures Act, 5 U.S.C. § 553 (1994).

the ADA and that the EEOC's interpretation is permissible and consistent with the legislative history of the ADA.[122] The *Arnold* court also cited the Supreme Court's position that interpretive guidelines may properly serve as a source of guidance, and that this circuit had previously looked to the EEOC's interpretive guidance in interpreting the ADA.[123] Adhering to these guidelines, the First Circuit, found Arnold to be disabled under the ADA, regardless of the corrective measures.[124]

The issue of self-accommodation as a corrective measure again arose in *Bartlett v. New York Board of Law Examiners*.[125] In this 1998 Second Circuit case, the New York Board of Law Examiners ("Board") denied Bartlett's request for special accommodation during the bar exam because the Board felt that she did not have a reading disability.[126] Bartlett argued that a cognitive disorder adversely impacted her ability to read.[127] The district court found that Bartlett was not limited in the major life activity of reading and learning.[128] The trial court recognized that Bartlett had low test scores and clinical findings that supported her contention that she had a reading problem.[129] The lower court held, however, that she was not substantially limited in the major life activities of reading and learning because she had developed cognitive accommodation strategies that allowed her to exhibit average reading skills as compared to the general population.[130]

The district court stated, however, that Bartlett was limited in the major life activity of work, because her inability to successfully pass the bar examination was related to a reading rate that compared unfavorably with those of comparable skills and abilities

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122. *See Arnold*, 136 F.3d at 863. "The ADA authorizes – indeed 'requires' – the EEOC to 'issue regulations in an accessible format to carry out the Act.' " *Id.* (citing Americans with Disabilities Act, 42 U.S.C. § 12116 (1994)).

123. *See id.* at 864. "[The EEOC interpretive guidelines] . . . deserve at least as much consideration as a mere 'internal agency guideline,' which the Supreme Court has held is entitled to 'some deference' as long as it is a permissible construction of the statute." *Id.* (citing Reno v. Koray, 515 U.S. 50, 61 (1995)). "Moreover, this court has previously 'looked to' the same body of EEOC Interpretive Guidance that is at issue here . . . to illuminate our efforts to 'interpret[ ] the ADA.' " *Id.*

124. *See id.* at 866.

125. 156 F.3d 321, 329 (2d Cir. 1998).

126. *See id.* at 324. Prior to this action, Bartlett was refused accommodation on at least three occasions and had failed the exam a total of five times. *See id.*

127. *See id.*

128. *See id.* at 325-26.

129. *See id.* at 326.

130. *See Bartlett*, 156 F.3d at 326. In fact, Bartlett had previously earned a Ph.D. and a law degree, and had successfully worked as a schoolteacher. *See id.* at 324, 326.

and prevented her from obtaining work in that field.[131] The Second Circuit affirmed the lower court's holding that Bartlett was disabled within the meaning of the ADA, but on the grounds that she was limited in the major activity of reading and learning (as opposed to working) because the analysis of her ability in this area should not have taken her self-accommodation into account.[132] The appeals court cited both *Doane*,[133] and the aforementioned House committee reports, in holding that Bartlett's history of self-accommodation as a corrective measure did not preclude her from ADA protection.[134] The Second Circuit did not cite to or reference the EEOC regulations on the matter.[135]

The Seventh Circuit, in the 1998 case of *Baert v. Euclid Beverage*,[136] found the ADA to be unclear on the issue of corrective measures and looked to the legislative history and EEOC regulations.[137] Baert, a truck driver, was unable to maintain his DOT commercial driver's license because he developed diabetes.[138] The district court held that Baert was not a "qualified individual" under the ADA because of his inability to maintain his license.[139] The circuit court agreed that Baert may no longer be qualified for the position, but held that the use of insulin as a corrective measure should not be considered in the disability analysis, and that the employer should have done more to accommodate him.[140]

The Seventh Circuit held that, although Baert controlled his diabetes through the use of insulin, he may still be disabled under the ADA as dictated by the EEOC guidelines.[141] The court, in fact, did not require Baert to produce evidence of what would happen to

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131. *See id.* at 326.

132. *See id.* at 329.

133. Doane v. City of Omaha, 155 F. 3d 624 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 693 (1998).

134. *See Bartlett*, 156 F.3d at 329.

135. *See id.* at 326-332.

136. 149 F.3d 626 (7th Cir. 1998).

137. *See Baert*, 149 F.3d at 628.

138. *See id.* Baert was already employed by Euclid as a driver, and held a commercial driver's license, when he was diagnosed with insulin-dependent diabetes. *See id.* However, he could not maintain his license after the diagnosis, because federal regulations state that anyone who uses insulin to control diabetes is not qualified to drive commercial vehicles. *See* 49 C.F.R. § 391.41 (1998).

139. *See Baert*, 149 F.3d at 628.

140. *See id.* at 630, 633. There was conflicting evidence regarding whether Baert was qualified for the positions that were subsequently offered to him, as an effort at accommodation, once he was deemed no to be unqualified to work as a driver. *See id.* at 631-32.

141. *See id.* at 630-31.

him without the use of insulin.[142] The fact that Baert is an insulin dependent diabetic established the severity of his impairment and was enough to overcome summary judgment on the point.[143] The *Baert* court was careful to point out, however, that no diagnosis establishes a disability per se, and that every disability evaluation must be an individualized inquiry.[144]

Although, like Murphy, Baert's impairment precluded him from holding a commercial driver's license, the *Baert* court's analysis differed somewhat from that of the Supreme Court in *Murphy*.[145] Both parties in *Baert* agreed that the claimant's inability to obtain the necessary licensure due to his illness rendered him unqualified for his originally sought position as a driver, whereas the *Murphy* Court looked at whether this inability contributed to the employer's regarding Murphy as disabled.[146] The *Baert* court focused, instead, on the employer's efforts to accommodate the claimant.[147] The case was remanded with orders to determine if Baert was disabled, without regard to the effect of medication, and whether he was qualified not for the position of driver, but for the two possible positions that were offered to him as an effort at accommodation.[148]

Each of the above circuit court decisions came before the United States Supreme Court had addressed the disability determination process. In the 1998 case of *Bragdon v. Abbott*, the Supreme Court outlined the disability analysis process under the ADA.[149] Although *Bragdon* was not an employment discrimination case, it established part of the analysis that the Court would apply to the facts of *Murphy* and *Sutton*. It is also the first case in which the Supreme Court discusses the role of EEOC regulations in determining

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142. *See id.* at 630.

143. *See id.* The court presented the impact of diabetes on multiple major life activities. *See id.* "The diagnosis itself, indicating that Baert is dependent on insulin, implies that Baert would become ill without medication." *Id.*

144. *See id.* at 631. "We are not holding that insulin-dependent diabetes, or any other disease for that matter, is a disability as a matter of law." *Id.*

145. *Murphy*, 119 S.Ct. 2133 (1999).

146. *See Baert*, 149 F.3d at 631. "The term 'qualified individual with a disability' means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8) (1994). Recall that *Murphy* never addressed the inability to meet the DOT requirements as disqualifying the claimant for the position, but rather, whether this inability played a role in the employer's regarding Murphy as disabled. *Murphy*, 119 S. Ct. 2133 (1999).

147. *See Baert*, 149 F.3d at 631.

148. *See id.* at 634.

149. 524 U.S. 624 (1998).

whether a claimant is disabled under the ADA.[150] The *Bragdon* Court applied this process in determining that asymptomatic HIV infection qualifies an individual for protection under the ADA.[151] The *Bragdon* Court briefly addressed the issue of the EEOC regulations on corrective measures and discussed the role of EEOC regulations in defining disability under the ADA.[152]

The claimant in *Bragdon* sought protection under the public accommodation provisions of the ADA when a dentist refused to perform a procedure in his office after learning of his patient's HIV status.[153] The Supreme Court held that HIV status is an impairment, substantially limiting the major life activity of reproduction.[154] The defendant argued that the use of antiretroviral therapy could reduce the risk of transmission from mother to child during pregnancy, so that reproduction would not be substantially limited.[155] The Court addressed the matter of corrective measures when the Solicitor General cited EEOC regulations that corrective measures such as the antiretroviral therapy should not be considered in the disability analysis.[156] The Court did not pass judgment on this position, however, holding that even with a reduced risk, the major life activity of reproduction was substantially limited.[157] The Court did present administrative guidance as support of its interpretation of what constitutes a disability under the ADA.[158] The Court cited the Justice Department, Secretary of Transportation and EEOC's Congressional

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150. *See Bragdon*, 524 U.S. at 630, 647.

151. *See id.* at 630, 655.

152. *See id.* at 647.

153. *See id.* at 629. Abbott, who needed a cavity filled, had disclosed her HIV status during registration at her dentist's office. *See id.* The dentist had a policy of performing this procedure on HIV infected patients at a hospital. *See id.*

154. *Id.* at 647. After a lengthy discussion of the impact of HIV infection on various physiological processes, the Court determined that it was, "from the moment of infection," an impairment for purposes of the ADA. *Id.* at 647-649.

155. *Bragdon*, 524 U.S. at 640. The defendant was arguing that this type of therapy would serve as a mitigating measure reducing the likelihood of transmission to the point that the major life activity of reproduction would not be substantially limited. *See id.* The Court discounted this argument, holding that even a reduced risk of transmitting the disease was substantially limiting. *Id.*

156. *Id.* at 640. The Court did not rule on the impact of these regulations, rather, it refused to say, "as a matter of law," that reducing the risk of transmission to eight percent was still not a substantial limitation. *Id.* at 641.

157. *See id.*

158. *Id.* at 641-42. "Our holding is confirmed by a consistent course of agency interpretation before an after enactment of the ADA." *Id.* at 642. "Every agency to consider the issue . . . found statutory coverage for persons with asymptomatic HIV." *Id.*

directives to issue regulations to implement the ADA, including a definition of disability.[159]

The Fifth Circuit, in September of 1998, examined the role of corrective measures in the disability analysis, and the appropriate deference due the EEOC guidelines on the matter, in *Washington v. HCA*.[160] This court held that the EEOC guidelines were due some level of deference but that the role of corrective measures depended on the nature of the impairment, emphasizing the case by case approach to the analysis.[161] The *Washington* court determined that the claimant, an accountant who suffered from Adult Stills Disease,[162] was disabled under the ADA, in spite of the fact that medication allowed him to lead a relatively normal life.[163]

The Fifth Circuit recognized that the level of deference due the EEOC guidelines on corrective measures was limited, because the agency did not have express authority to define statutory terms, nor were the regulations subject to the notice and comment procedures outlined in the APA.[164] The court refused, however, to ignore the EEOC guidelines completely, as they appeared to be consistent with the legislative history of the ADA.[165] As with the other circuits, the court presented Senate and House Committee reports to support this proposition.[166]

The *Washington* court added a "seriousness" examination to the

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159. *Bragdon*, 524 U.S. at 642-46. The opinion notes the administrative precedent of construing the definition of disability, particularly as it relates to the Justice Department's guidance in implementing regulations regarding public accommodation under Title III of the ADA. *Id.* at 646. "The Justice Department's interpretation of the *definition* of disability is consistent with our analysis." *Id.* (emphasis added). Later, in *Sutton*, the Supreme Court held that no agency had the authority to issue regulations that would define the term disability under the ADA. *See Sutton*, 119 S. Ct. at 2145.

160. 152 F.3d 464 (5th Cir. 1998).

161. *See id.*

162. *See id.* Adult Stills Disease is defined by the Fifth Circuit as "a degenerative rheumatoid condition affecting [the] bones and joints." *Id.* Washington also suffered from a related kidney disease. *See id.* at 466.

163. *See id.* at 471. Without the medication, Washington would have been confined to a bed and unable to work. *See id.* at 466.

164. *See id.* at 469. The Court cites several factors that influence how much deference will be given an agency interpretation. *Id.* at 470. "The factors include: 'the circumstances of their promulgation, the consistency with which the agency has adhered to the position announced, the evident consideration which has gone into the formulation, and the nature of the agency's expertise.' " *Id.* (quoting Rowinsky v. Bryan Independent School District, 80 F.3d 1006, 1014 n.20 (5th Cir. 1996)).

165. *Washington*, 152 F.3d at 467. "Although we think it is more reasonable to say that mitigating measures must be taken into account, we recognize that our position is not so much more reasonable to warrant overruling the EEOC." *Id.* at 470.

166. S*ee id.* at 467-68.

analysis of the role of corrective measures, holding that only those impairments that were serious should be considered in the unmitigated state.[167] It defined "serious" as impairments that were analogous to those mentioned in the EEOC guidelines and Congressional Committee reports such as diabetes, epilepsy, and hearing impairments.[168] Under the Fifth Circuit approach, any condition that is not serious, or that can be permanently and completely corrected, such as through the use of an artificial joint, should be evaluated in the corrected state.[169]

The Supreme Court decided *Murphy* as a companion case to *Sutton v. United Airlines.*[170] *Sutton* involved employment criteria that were established by the employer, whereas the employer in *Murphy* relied on criteria set out by the DOT.[171] Each case examined whether the employer regarded the claimants as disabled and whether corrective measures should be considered in determining whether an individual is disabled under the ADA.[172] The Court's analysis in *Sutton*, ignoring the EEOC regulations and the legislative history of the ADA, dictated to a large extent the outcome of the corrective measures issue in *Murphy*.[173]

The claimants in *Sutton* applied for positions as global pilots with United Airlines, but were turned down because they did not meet the airline's minimum vision requirements.[174] With the use of corrective lenses, the claimants' vision did not substantially limit their daily activities.[175] The employer argued, and the district court and Tenth Circuit agreed, that the claimants, when using this corrective measure, were not disabled under the ADA, and that United Airlines had not regarded them as disabled.[176] The Tenth Circuit's holding on the role of corrective measures differed significantly from that of the majority rule from the other circuits, and the United States Supreme Court granted certiorari to resolve the issue.[177]

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167. *See id.* at 470.

168. *See id.*

169. *See id.* at 471. "The impairments must be serious in common parlance, and they must require that the individual use mitigating measures on a frequent basis . . . ." *Id.* at 470.

170. 119 S.Ct. 2139 (1999).

171. *See Sutton*, 119 S.Ct. at 2141; *Murphy*, 119 S. Ct. at 2136.

172. *See Sutton*, 119 S. Ct. at 2144; *Murphy*, 119 S. Ct. at 2136.

173. *Murphy*, 119 S. Ct. at 2136.

174. *Sutton*, 119 S. Ct. at 2141. Claimants' uncorrected vision was 20/200; United Airlines required, at least, 20/100 vision without corrective lenses. *See id.*

175. *See id.*

176. *See id.*

177. *See id.* at 2144.

The Supreme Court majority opinion in *Sutton* by Justice Sandra Day O'Connor affirmed the lower courts' dismissal of the action.[178] Justice O'Connor, with Justice Ginsburg concurring, held that corrective measures must be taken into account in the disability analysis.[179] Given this approach, the claimants in *Sutton* were not substantially limited in a major life activity, and therefore, were not protected under the ADA.[180]

The *Sutton* opinion recognized the authority granted by the ADA to the EEOC, Attorney General, and Secretary of Transportation to promulgate regulations to implement the ADA.[181] The Court clarified, however, that no agency had authority to promulgate regulations regarding "generally applicable provisions" of the ADA, including an interpretation of the term "disability."[182] The Supreme Court held that the position of these agencies, that corrective measures should not be considered in the disability analysis, was an impermissible interpretation of the ADA.[183] The claimants argued that the ADA does not address the issue, and so the Court should examine the agency interpretations and legislative history; but the Supreme Court held that the ADA was clear on its face on the matter, and no further analysis was necessary.[184]

In the Court's opinion, the phrase "substantially limits" as used in the ADA regarding an impairment's impact on a major life activity, is a verb form indicating "present," as opposed to "potential," limitations.[185] This, along with the requirement that each disability analysis be made on an individual, case-by-case basis, necessitates that impairments be analyzed in their corrected state.[186] Moreover, Justice O'Connor found critical importance in the ADA's statement that "some 43,000,000 Americans have one or more physical or

178. *Sutton*, 119 S.Ct. at 2144. Justice O'Connor also wrote the *Murphy* majority opinion. *Murphy*, 119 S.Ct. 2133.

179. *See id.* at 2146, 2152 (Ginsburg, J., concurring).

180. *Id.* at 2149.

181. *Id.* at 2144-45.

182. *See id.* at 2145.

183. *See Sutton*, 119 S.Ct. at 2146.

184. *See id.* Regarding the position, presented in the dissent by Justices Stevens and Breyer, that the legislative history should be analyzed, the *Sutton* majority stated the following: "Because we decide that, by its terms, the ADA cannot be read in this manner, we have no reason to consider the ADA's legislative history." *See id.*

185. *Id.* at 2146-47. "Because the phrase 'substantially limits' appears in the Act in the present indicative verb form, we think the language is properly read as requiring that a person be presently – not potentially or hypothetically – substantially limited in order to demonstrate a disability." *Id.* at 2146.

186. *See id.* at 2146-47.

mental disabilities."[187] Justice O'Connor concluded that a disability definition that considered all impairments in their uncorrected state would bring a far greater number of individuals under the protection of the ADA.[188] As such, the Court stated that "the 43 million figure reflects an understanding that those whose impairments are largely corrected by medication or other devices are not 'disabled' within the meaning of the ADA."[189]

The *Sutton* Court also addressed the claimants' position under the third prong of the ADA that the employer regarded them as disabled.[190] Here, interestingly, the Court turned to the EEOC regulations to support its position.[191] To be successful under the "regarded as" provision, the employee must establish that the employer mistakenly believed the employee's impairment substantially limited her in the major life activity of working.[192] EEOC guidelines define "substantially limits," in this context, as being restricted in performing a broad class of jobs, as opposed to a particular job.[193] In *Sutton*, the claimants could not meet United Airline's vision requirements for the position of "global pilot."[194] They were not necessarily precluded from working as pilots or co-pilots in other capacities; therefore, they were not regarded as substantially limited in the major life activity of working.[195] Thus, application of its own vision standards did not equate to regarding the claimants as being disabled.[196]

The Supreme Court's holding in *Murphy v. UPS*,[197] in conjunction

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187. *See id.* at 2147. "[S]ome 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing . . . ." *Id.* (quoting The Americans with Disabilities Act, 42 U.S.C. § 12101(a)(1) (1994)).

188. *See Sutton*, 119 S.Ct. at 2148.

189. *See id.* at 2149. "Had Congress intended to include all persons with corrected physical limitations among those covered by the Act, it undoubtedly would have cited a much higher number of disabled persons in the findings." *Id.*

190. *Id.* Recall that the ADA protects an individual if, rather than being discriminated against because of an actual disability, she is regarded as being disabled by the employer. *See supra* at notes 10, 12. Petitioners here alleged that the airline's vision requirement was based on "myth and stereotype" and substantially limited the major life activity of working. *Sutton*, 119 S. Ct. at 2150.

191. *See id.* at 2151 (citing 29 C.F.R. § 1630.2(j)(3)(i) (1998)).

192. *See id.* at 2150 (citing 29 C.F.R. § 1630.2(j)(1)(i),(ii) (1998)).

193. *See Sutton*, 119 S.Ct. at 2151. The court references the EEOC's definition of "substantially limits" as it relates to the major life activity of working: "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs . . . ." 29 C.F.R. § 1630.2(j)(3)(i) (1998).

194. *Sutton*, 119 S. Ct. at 2151.

195. *See id.*

196. *See id.*

197. *See id.* at 2133.

with its opinion in *Sutton v. United Airlines*,[198] will have far-reaching practical and legal implications for ADA claimants. Millions of impaired workers may now have great difficulty establishing that they are disabled under the ADA. These same workers will also be limited in their ability to argue that an employer regarded them as being disabled. These opinions represent a restrictive reading of the statute, significantly limiting the number of employees who can seek the protection of the ADA.

The Court's position that a petitioner must be evaluated in the corrected state when determining whether she is disabled under the ADA will impact over 100 million impaired workers.[199] It is estimated that 150 million workers currently use glasses or contacts to correct their vision, 5 million wear hearing aids, and over 50 million rely on medication to control various conditions.[200] Many of these workers will now fall outside of the ADA's disability definition and be denied Title I protections against workplace discrimination.

Murphy and *Sutton* provide clarification of the Supreme Court's position on the definition of disability under the ADA and significantly restrict the statute's applicability. Justice O'Connor's opinions in *Murphy* and *Sutton* provide guidance for employers and clarify the role of physical and health-related job requirements in determining whether a petitioner is disabled under the ADA.

Under the first prong of the ADA's disability definition, the Court held that mitigating measures must be considered in determining whether the claimant is "disabled."[201] The third prong of the ADA's disability definition protects employees who are erroneously perceived as being disabled.[202] *Murphy* establishes that an employer may refuse to hire an employee based on DOT health regulations, and this reliance will not support the employee's contention that she was discriminated against because the employer regarded her as disabled.[203] *Sutton*, on the other hand, held that the employer may rely on its own physical hiring criteria in refusing to hire an

198. *See id.* at 2139.

199. *See* John M. Husband & Monique A. Tuttle, *Corrective Measures in the Determination of Disability under the ADA*, 28 Nov. COLO. LAW. 5 (1999).

200. *See id.*

201. *See* 42 U.S.C. § 12103(2) (1994). "The term 'disability' means, with respect to an individual-(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." *Id.*

202. *See id.*

203. *Murphy*, 119 S. Ct. at 2138.

applicant, without regarding the employee as being disabled.[204] The Supreme Court's opinion in *Bragdon v. Abbott*[205] first presented the Court's disability analysis approach under the ADA, and provided a *broad* definition of disability. *Murphy* and *Sutton*, on the other hand, demonstrate a much more restrictive reading of the ADA.

The paradoxical result of this new, restrictive reading of the ADA, is that an employer may rely on DOT regulations, or its own physical hiring criteria, in refusing to hire an individual. The employer may consider the individual in her uncorrected state and determine that she does not meet these criteria. That same individual may, then, be denied the protection of the ADA because she successfully manages her condition through the use of medication or corrective devices. In this corrected state she may not be disabled under the ADA. She will also be restricted in her ability to argue that the employer erroneously "regarded" her as disabled under the ADA disability definition's third prong.

These restrictions may prove to be the prudent course, but the Court's eagerness to stem a potential tide of Title I ADA litigation resulted in opinions that are less than persuasive and too quick to artificially construe a statute in a manner that directly contradicts congressional intent.

An analysis of the Court's reasoning in *Murphy* and *Sutton* demonstrates that: (1) the Court was correct that the petitioners in *Murphy* and *Sutton* were not regarded as disabled by the employers, but this conclusion was over-broad and unnecessary in disposing of the matter; and (2) the Court was incorrect in both its conclusion and argument on the issue of corrective measures.

The Court adopted the correct position that under the third prong of the ADA's disability definition, UPS did not erroneously regard Murphy as disabled. UPS did not discriminate against Murphy because of a misperception about his abilities. UPS merely disqualified Murphy from consideration for the position because he was unable to obtain a DOT health card.[206] Likewise, in *Sutton*, United Airlines had clearly established vision guidelines.[207] The application of these guidelines to the petitioners involved no misperceptions about their actual visual impairment or its limitation on their ability to perform the major life activity of working.

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204. *Sutton*, 119 S. Ct. at 2150.
205. 524 U.S. 624.
206. *See supra* notes 4-7 and accompanying text.
207. *See supra* note 173.

The Court was too eager, however, to consider whether the petitioners were regarded as disabled and could have disposed of the matter on more obvious grounds. The ADA's definition of a qualified individual states that the individual must be qualified to perform the essential job functions "with or without reasonable accommodation."[208] The Supreme Court should have followed the lead of the Seventh Circuit in *Baert*[209] and found Murphy and the Sutton petitioners unqualified for the respective positions. In doing so, the Court would have still established that employers may rely on physical characteristic criteria in making employment decisions. The *Murphy* and *Sutton* opinions came to this conclusion, but via a circuitous route that unnecessarily sought to narrow the ADA's disability definition. The Court's conclusion is correct; its analysis seems misguided.

The Supreme Court's position on the role of corrective measures in the disability analysis, on the other hand, is incorrect, and its opinions in *Murphy* and *Sutton* are transparent efforts to override clear congressional intent. The seven circuit courts whose holdings directly contradict the Supreme Court on the issue,[210] and the dissenting opinions presented in *Murphy* and *Sutton*,[211] represent the more reasonable approach.

Justice O'Connor states in *Sutton* that the ADA's language is clear on the role of corrective measures.[212] This position is unreasonable. The First Circuit stated in *Arnold* that the ADA is "far from clear" on the role of corrective measures in the disability analysis.[213] That court held that on reading the statute, "reasonable people could differ" on the matter.[214] A review of the language of the ADA shows that the statute does not mention corrective measures.[215] The Supreme Court, however, is overly impressed with the verb forms used in discussing disability and impairment,[216] and

208. 42 U.S.C. § 12111(8) (1994). "The term 'qualified individual with a disability' means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." *Id.*

209. *Baert*, 149 F.3d at 634.

210. *See supra* notes 68, 77, 92, 99, 109, 125, 134, and 156 and accompanying text for a discussion of the opinions of the circuit courts.

211. *See supra* notes 39-43 and accompanying text for a discussion of the dissents in *Murphy* and *Sutton*.

212. *Sutton*, 119 S. Ct. at 2146.

213. *Arnold*, 136 F.3d at 858.

214. *See id.* at 859.

215. 42 U.S.C. § 12111-12213.

216. *See Sutton*, 119 S. Ct. at 2146. "Because the phrase 'substantially limits' appears in the Act in the present indicative verb form, we think the language is properly read as

the number of Americans cited as having disabilities.[217] The Court argues that the term "substantially limits," as used to describe the impact of an impairment on a major life activity, indicates Congressional intent that corrective measures be considered.[218] This argument is unpersuasive in light of the legislative history of the ADA. Moreover, that the ADA states that 43 million Americans have disabilities, rather than indicating the role of corrective measures in the disability analysis, merely demonstrates the scope of the problem and the broad remedial nature of the ADA.

The *Sutton* majority, holding that the ADA was clear on its face, refused to examine the ADA's legislative history.[219] If it had done so, the Court would have been forced to see that its position on the matter could not be rationally supported. House and Senate reports from Congressional debate on the ADA emphatically state that corrective measures should not be considered in determining whether an individual is disabled under the ADA.[220]

Finally, the ADA charges the respective administrative agencies with the duty of implementing the ADA, including the promulgation of appropriate regulations.[221] The ADA does not adequately define disability. Administrative agency regulations have appropriately provided guidance on the matter. In *Murphy* and *Sutton*, however, the Supreme Court held that administrative agencies such as the EEOC do not have authority to define the generally applicable terms of the ADA, including the term "disability."[222] This is a direct contradiction to the Court's earlier approach in *Bragdon*, where it turned to guidance from the Justice Department in attempting to define disability under the ADA.[223]

The EEOC appropriately reflected congressional intent in promulgating rules that require the disability analysis to be made

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requiring that a person be presently – not potentially or hypothetically – substantially limited in order to demonstrate a disability." *Id.*

217. *See id.* at 2149. "Had Congress intended to include all persons with corrected physical limitations among those covered by the Act, it undoubtedly would have cited a much higher number of disabled persons in the findings." *Id.*

218. *See supra* note 184 and accompanying text.

219. 119 S. Ct. at 2146. "Because we decide that, by its terms, the ADA cannot be read in this manner, we have no reason to consider the ADA's legislative history." *Id.*

220. *See supra* note 42 for a discussion of these reports.

221. *See* 42 U.S.C § 12116.

222. *Sutton*, 119 S. Ct. at 2145.

223. *See Bragdon*, 524 U.S. at 646. The Court references the Justice Department's guidance in defining disability under the ADA in implementing Title III of the ADA. *See id.* "The Justice Department's interpretation of the *definition* of disability is consistent with our analysis." *Id.* (emphasis added).

irrespective of any corrective measures employed by the individual.[224] In *Murphy* and *Sutton*, however, the Supreme Court ignored its own instructions from *Chevron*.[225] In *Chevron*, the Court held that when Congress has not directly addressed an issue in a statute, the Court cannot impose its own construction unless the agency's interpretation is based on an impermissible construction of the statute.[226] Nothing on the face of the ADA, or in its history, suggests that the EEOC interpretation is impermissible. The Fifth Circuit's *Washington*[227] opinion articulates the position that the Supreme Court should have taken, in deference to the respective roles of the judiciary and legislature: "Although we think it more reasonable to say that mitigating measures must be taken into account, we recognize that our position is not so much more reasonable to warrant overruling the EEOC."[228]

The Supreme Court, in *Murphy* and *Sutton*, took advantage of an opportunity to restrict the applicability of the ADA. The Court avoided the more reasonable position that Murphy, and the petitioners in *Sutton*, were not qualified for their respective positions so that it could restrict application of the "regarded as" clause of the ADA's disability definition. In holding that individuals should be evaluated in their corrected state when determining whether they are disabled under the ADA, the Court was less subtle. This holding represents a more blatant disregard for the authority of Congress, and the authority granted by Congress to the EEOC. The Supreme Court imposed its own construction of the statute, ignoring the intent of the drafters of the ADA, and the reasonable and constitutionally permissible interpretation of the ADA by the EEOC.

Bryan J. Warren

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224. *See supra* note 11 for a discussion of the relevant EEOC regulations.

225. *Chevron*, 467 U.S. 837.

226. *Id.* at 843. "[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* "[A]n agency's interpretation of a statute it is entrusted to administer should be given 'considerable weight' and should not be disturbed unless it appears from the statute or legislative history that Congress intended otherwise." *Id.* at 844-45.

227. 152 F.3d 464.

228. *Id.* at 470.